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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Review of the Commission's Rules)	MM Docket No. 97-138
regarding the main studio and)	RM-8855
local public inspection files of)	RM-8856
broadcast television and radio stations)	RM-8857
)	RM-8858
To: The Commission)	RM-8872

LIMITED PETITION FOR RECONSIDERATION BY THE NAMED STATE BROADCASTERS ASSOCIATIONS

The Alaska Broadcasters Association, the Connecticut Broadcasters Association, the Iowa Broadcasters Association, the Kansas Association of Broadcasters, the Louisiana Association of Broadcasters, the Maine Association of Broadcasters, the Massachusetts Broadcasters Association, the Minnesota Broadcasters Association, the Missouri Broadcasters Association, the Nebraska Broadcasters Association, the New Hampshire Association of Broadcasters, the Ohio Association of Broadcasters, the Oklahoma Association of Broadcasters, the Oregon Association of Broadcasters, the Texas Association of Broadcasters and the Vermont Association of Broadcasters (collectively, the "Associations"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §§ 1.429, hereby jointly submit this Limited Petition for Reconsideration ("Petition") concerning the Commission's Report and Order ("Report and Order") in the above-referenced proceeding.¹ As set forth in greater detail below, while the Associations generally applaud the Commission's modifications of its main studio and public file rules, in a few limited respects, the Associations believe that newly adopted provisions of the rules are unduly burdensome and should be substantially modified or deleted.

^{1/} In the Matter of Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations, Report and Order, ("Report and Order"), MM Docket No. 97-138, FCC 98-175 (August 11, 1998).

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INTRODUCTION AND SUMMARY

1. The Associations are seeking limited reconsideration of the Report and Order as it relates to certain of the new public inspection file and political file requirements. Each of the Associations is chartered to help create and maintain a regulatory and economic environment conducive to the growth of the free, over-the-air, locally based, full service radio and television broadcast industry in their respective states. A related responsibility is be alert to potential new regulatory burdens on the broadcast industry which may not serve the public interest. As such, the Associations have a direct interest in this matter since they represent entities regulated by the Commission who are adversely affected by certain of the new regulations promulgated in this proceeding. Therefore, the Associations have the requisite interest to file this Petition.

2. On August 11, 1998, the Commission released its Report and Order adopting changes to its main studio and public inspection file rules.² The Associations support the Commission's goal to afford greater flexibility in the location of a station's main studio and public inspection file while continuing to insure reasonable access for the public, and generally applaud the actions taken in the Report and Order. However, the Commission, in a few respects, has adopted new regulations the impact of which may not be fully recognized. Such rules actually thwart the deregulatory intent of the Report and Order. Specifically, the Associations submit that the Commission should reconsider its adoption of the following new regulations (collectively, the "New Requirements"):

1. The new requirement that stations maintain enough trained staff to field telephone calls throughout the business day from unlimited numbers of people, irrespective of their location or purpose, about the organization and contents of the station's public and political files;
2. The new requirement that stations utilize their staff to duplicate the contents of those files, and to package, label,

^{2/} 47 C.F.R. §§73.3526 and 73.3527 (1998).

and mail the requested contents;

3. The new requirement that stations absorb the cost for such postage and handling irrespective of the size and weight of the contents, the frequency of the mailings, etc.; and
4. The new requirement that stations monitor the e-mail messages of all personnel to make sure that all e-mail messages received at the station about the station's operations are accounted for and placed in the public file.

These New Requirements are unduly burdensome on the broadcaster, and the need for these New Regulations is not supported by the record. Not only are they inconsistent with the dictates of the Administrative Procedure Act (the "APA")³, they are also inconsistent with the Paperwork Reduction Act (the "PRA")⁴ and the Regulatory Flexibility Act (the "RFA")⁵. Accordingly, the New Requirements should be reconsidered and deleted.

ARGUMENT

I. The New Requirements are Inconsistent with at Least Three Federal Statutes.

3. The APA, PRA and RFA bar the Commission from lawfully adopting any of the New Requirements. Under the APA, the Commission may not promulgate a new regulation unless that regulation is rational and supported by substantial evidence in the record taken as a whole.⁶ Here, the Commission would attach new telephone inquiry/mailing responsibilities to all broadcasters, even to broadcasters who have no intention of relocating their main studio or public/political files. For those broadcasters who may seek to move their main studios, but retain their public files within the corporate limits of their city of license, they too will be newly burdened without rational justification. In short, these New Requirements are fatally overbroad.

^{3/} 5 U.S.C. § 551 et seq (1995).

^{4/} Pub. L. No. 104-13, 109 Stat. 163 (1995).

^{5/} See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 et seq, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. § 47 (1996) (CWAAA).

^{6/} See Allentown Mack Sales & Serv., Inc. v. NLRB, 66 U.S.L.W. 4100 (1998).

4. The New Requirements will substantially increase, rather than reduce, the amount of paperwork required by broadcasters to insure compliance with the New Requirements. The entire purpose of the PRA is to restrain federal agencies from creating more paperwork for the nation's citizens and businesses.⁷ The New Requirements do just the opposite. For example, for the orderly implementation of the new telephone inquiry/mailling responsibilities, stations will have to (a) train staffers, which will include developing and constantly updating telephone "cue cards" to help staffers answer the most detailed questions about their station's public/political files; (b) maintain detailed listings of the titles, page lengths, and descriptions of each document in the public/political files; (c) maintain telephone logs to record who called, on what date, at what time, for how long, what questions were asked, what information was requested, etc.; (d) maintain photocopying logs for charges to the persons requesting documents; and (e) maintain mailing/postage logs for internal budgeting/accounting purposes. It is inevitable that staffers will be drawn into questions about the substance of the documents as well as their purpose, and/or asked about specific data in the documents, etc. thereby lengthening calls and increasing the opportunity for misunderstanding. Also, it is anticipated that not only will the calls be numerous (as all newly minted "rights" are rapidly and fully exploited by the public), each will be lengthy given the breadth of documents that can be discussed and requested for copying and mailing. Moreover, a station's public file can consume several file drawers involving annual mailing costs of thousands of dollars.

5. This burden will fall most heavily on smaller stations. Many small stations have staffs of few employees, all of whom perform a variety of functions. Sometimes even the general manager will be answering the phone during certain hours. In these cases, the New Regulations

^{7/} Congress enacted the PRA to minimize the paperwork burden for individuals, small businesses and other persons resulting from the collection of information by or for the Federal Government; [and] ensure the greatest possible benefit from and maximize the utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government. See Pub. L. No. 104-113, at §3501 (1), (2), 109 Stat. 163, 164 (1995).

will mandate that each employee of the station be totally familiar with not only what documents are in the public file, but also the contents of every one of those documents. Now, if a member of the general public wants to find out if there is anything in the station's public file relating to a specific issue, they can look through the file to see if there is anything relevant to their issue of interest. Under the Commission's New Requirements, any station staffer taking such an inquiry over the telephone must be prepared to determine whether any document in the public file might be relevant to the caller's interest. Basically, this will require that the station staffer read each document in the public file, and act as a mind-reader to determine whether any of those documents are what the caller is looking for. Again, at a small station, this burden could well paralyze station operations.

6. Until now, none of these burdens existed. The Associations note that the Commission does not require its own staffers to field calls from the public asking them to identify the contents of its files and to mail those contents to them. Rather, the Commission requires the public to deal with a third party independent contractor with all costs chargeable to the public -- search time, photocopying, mailing and handling.

7. The RFA also constrains the Commission. The entire focus of the RFA is to protect small businesses by limiting the regulatory burdens placed on them by government agencies.⁸ In this rulemaking, the Commission provides no exemption for broadcasters, particularly the smaller ones, whether or not they choose to re-locate their public files. The new public/political file requirements deny broadcasters the choice of rejecting the Commission's broadening of its main studio/public file "accommodation" while heaping voluminous disclosure requirements on them anyway. Such a result contradicts the intent of the RFA by burdening those broadcasters who have historically met their public inspection file requirements without complaint

^{8/} Congress enacted the RFA to encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses. See Pub. L. No. 96-354, at 2(b), 94 Stat. 1164, 1165 (1980) (statement of purpose).

-- once again demonstrating that these New Requirements are fatally overbroad.

II. The New Requirements Have the High Potential of “Criminalizing” Virtually All Telephone Calls to Stations, and of Overwhelming the Commission with Complaints.

8. The New Requirements will potentially convert every call to a station into a rule violation and a complaint to the FCC for unfounded public/political file complaints. In mandating “telephone inspections” of station public/political files, the Commission forces broadcasters to institute an elaborate system filled with vast amounts of paperwork to defend itself against complaints from the public. For example and as mentioned, the stations will be forced to maintain telephone response checklists, detailed listings of all documents in the public/political files and their corresponding number of pages, and also continually update these detailed listings as each new item is placed in the public/political file. Moreover, the stations will now have to maintain telephone logs with the name, address and telephone number of the requester, mail logs, photocopy logs with a list of charges, and may even have to tape these telephone conversations to ensure “quality of service.”

9. While the Commission does not require stations to keep these materials, such record retention is essential in order for every station to defend its record of compliance. The stockpiling of all of this evidence, however, will not necessarily deter a caller from filing a complaint with the Commission if he or she feels that the station has not properly discharged its duties under these New Requirements. The base forfeiture for a public inspection file violation is \$10,000.⁹ According to the Commission’s Forfeiture Policy Statement,¹⁰ enacted pursuant to the Telecommunications Act of 1996,¹¹ the FCC is empowered to take a station’s license away for a

^{9/} In the Matter of the Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, 12 FCC Red 17087 (1997).

^{10/} Id.

^{11/} Pub. L. No. 104-104, 110 Stat. 56 (February 6, 1996).

pattern of violations. Accordingly, stations will have no option but to fight each and every public/political file complaint, no matter how frivolous.

10. The Commission should be mindful that the new telephone provision will render stations vulnerable to attacks founded entirely on subjective interpretations of the callers' dealings with the station. Even a caller with a good-faith request could complain that a station employee was unhelpful or uncooperative or that the station did not return his or her call promptly enough. Or perhaps the station accidentally sent the wrong documents, or some of the pages from the requested documents were inadvertently omitted. Despite the good faith presumed of both parties in such scenarios, any mistake in disclosing public file information may result in allegations of the station's dereliction of duties under the New Requirements. The Commission must not allow broadcasters to fall prey to the vagaries of the public's demands and perceptions. Although some of these complaints may be disposed of fairly quickly, the allegations of callers levied against stations and personnel could involve one person's word against another's, requiring resolution by the Commission's staff. The Commission is ill-equipped to resolve these types of conflicts.

11. The foregoing assumes only the purest of motives of the public in making telephone inspections. It would be imprudent, though, to ignore the possibility that in some cases, maybe in many cases, telephone requests will be made in bad faith. For any listener or viewer who has ever believed, justifiably or not, that his or her interests were not properly being served by the station, making available the opportunity to harass the station from the comfort and relative anonymity of a person's living room is a dangerous proposition. This would be especially true in the case of a person or organization which disapproved of a station's programming and targeted the station with numerous harassing public file phone requests. Moreover, a competitor, searching for any possible infringement to cause trouble, will also now have the opportunity to organize an effort to flood the station with numerous telephone requests. The possibilities for bad

faith requests are limitless.

12. From the Commission's perspective, the agency itself will be unable to handle the volume of public/political file complaints generated by the New Requirements. As the Associations stated, there is no practical method for adjudicating such complaints. The Commission will be unable to distinguish between legitimate complaints and those warranting swift dismissal without a protracted investigation of the matter. The problems caused by the New Requirements, as they relate to the political file, are illustrative of the potential for chaos.

13. During an election period stations are bombarded with visits by representatives of political candidates and media buyers inspecting the political file to see what kind and amount of advertising time opposing candidates are purchasing on the station. The contents of the political file change throughout the day. Thus, the station's political file is subject to intense repeated scrutiny by very motivated persons. With the new rule permitting telephone requests for this detailed sales information, broadcasters will be overwhelmed by phone calls. Station staffers will inevitably be pressed into trying to answer numerous questions about political programming and sales practices, to interpret the information contained in a wide variety of documents, and to determine which documents are relevant to a particular request. While the FCC has temporarily stayed the implementation of the public file rule as it applies to the political arena, this just delays the onset of the inevitable chaos. In reality, during the weeks directly after the election, candidates and their buyers still scrutinize the political file to see if the station met its political time obligations based on the documents in the political file. Therefore, the interest in the political file does not automatically cease on election day and a temporary stay does little to eliminate the unwarranted burden on broadcasters.

14. In the Report and Order, the Commission has offered the possibility of a waiver of these New Requirements for those broadcast stations which are subjected to an overwhelming volume of telephone requests. However, just as the temporary stay granted for political file

information is ineffective, a waiver relieving the station from its telephone disclosure obligations in such a circumstance would be equally worthless. What is the broadcaster expected to do in the interim period while awaiting the Commission's action on a waiver request? Also, a temporary waiver expires. Unfortunately, the high volume of calls may not terminate at the same time the waiver expires.

15. The Associations submit that the telephone access requirements, while perhaps worthy in intent, are simply unworkable in practice. Therefore, these New Requirements should be deleted.

III. The FCC Should Withdraw, or at Least Limit the Scope Of, its New E-mail Message Requirement.

16. The Commission has recognized the importance of e-mail to broadcast stations as a way of receiving immediate feedback from the public. While this sense of immediacy and accessibility is useful, broadening the contents of the public inspection file to include e-mail carries significant burdens distinct from those which accompany retaining traditional letter correspondence. The burden which is most problematic relates to rights of privacy. As currently written, the New Regulations would require that copies of e-mail to anyone at the station would have to be placed in the public file. Thus, even personal e-mail, addressed to a single individual at the station but addressing some programming matter, would be subject to copying for the public file. To determine whether any e-mail received at the computer stations of all station staffers should be publicly disclosed will require an intrusive review of each item of incoming e-mail for each station employee. The Commission not only fails to provide guidance or suggestions as to how this review should proceed, but it neglects to acknowledge the issue altogether. Without doubt, e-mail is the modern means of communication, and both broadcasters and the public alike can derive tremendous benefit from its use. The fair and simple way to exploit that benefit, while avoiding the privacy issue, is to require stations to retain only those e-mails which are received at

the station's general electronic address, or those specifically addressed to station management.

CONCLUSION

The Associations applaud the Commission's efforts to eliminate unnecessary regulatory burdens and ease the operating requirements on broadcasters. However, as set forth above, the Associations believe that, in certain instances, the New Regulations frustrate the Commission's purpose of easing regulatory requirements. To rectify these concerns, the Commission should promptly reconsider and delete the New Requirements identified above.

Respectfully submitted,

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